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No. 87-946

In The
Supreme Court of the United States
October Term, 1987

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CITY OF PALO ALTO, CITY OF PALO ALTO UTILITIES, AND CITY OF ATHERTON,

Appellants,

vs.

CENTURY FEDERAL, INC., UNITED STATES OF AMERICA,

Appellees.

—o—

On Appeal From The United States District Court For The Northern District of California

—o—

APPELLANTS' REPLY TO MOTION TO DISMISS

—o—

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Century Federal agrees that this appeal raises important questions of constitutional law and presents a "fully developed record" suitable for their resolution. Century Federal Motion to Dismiss at 21. It nevertheless moves to dismiss the appeal. Its motion, and the brief filed by the United States, purportedly as an amicus curiae, both rely on legal generalities that have little or nothing to do with this case. The contentions of those parties that this Court does not have jurisdiction over this appeal should be rejected.

ARGUMENT

I.

THE DISTRICT COURT DECLARED NUMEROUS PROVISIONS OF THE CABLE ACT UNCONSTITUTIONAL.

Century Federal—although not the United States—contends that the District Court did not hold any provision of the Cable Act unconstitutional. Century Federal argues that the District Court simply construed the Cable Act to avoid holding it unconstitutional, and that the question of whether its construction was correct does not raise an appealable issue under Section 1252. Mot. Dis. 13-16. It also asserts that the Cable Act's constitutionality is not presented by this case because Appellants enacted the invalidated provisions of Century Federal's cable franchise pursuant to state law, rather than the Cable Act. *Id.* at 16-19. Both contentions are meritless.

1. Century Federal contends that "this Court will face the constitutional issues appellants tender only if it were to conclude that the District Court's construction of the Cable Act is erroneous." *Id.* at 13 n.15. However, the District Court's construction of the Cable Act avoided ruling on its constitutionality in name only. While the

District Court did not "*purport* to make any determination on the constitutionality of any particular provisions of the Act" (J.S. App. 2a n.1 (emphasis added)), it simultaneously held that the Act "authorizes" the franchise provisions invalidated by its ruling. *Id.*

This holding is fatal to Century Federal's position. Statutes which authorize government officials to engage in unconstitutional conduct are unconstitutional statutes. *See* Jur. Stmt. 18-20. Century Federal does not even attempt to explain how the District Court's invalidation of requirements to provide PEG access and specified facilities and equipment—which the District Court explicitly held to be authorized by the Cable Act—is anything other than a ruling that the Act itself is unconstitutional.[1]

Century Federal's treatment of the Cable Act's mandatory requirements is even more cursory. While Century Federal implies that the constitutionality of commercial leased access is not at issue here because such access is mandated only for systems with thirty-six or more channels, it did not tell the District Court nor has it represented to this Court that it will build a system with less than that number. Indeed, if Century Federal did intend to build a system with fewer than thirty-six channels, Appellants would have been *prohibited* by the Cable Act from requiring commercial leased access. *See id.* § 612(b)(1)

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[1] Century Federal makes much of the fact that this Court has never accepted jurisdiction under Section 1252 in a case where the District Court explicitly stated that it was not "purporting to determine" the constitutionality of a federal statute. Mot. Dis. 14-15. But this case is the first in which this Court has been faced with a District Court decision which *in fact* invalidated the exercise of authority granted by a federal statute while at the same time incorrectly purporting not to rule on that statute's constitutionality. It would be strange law indeed if the mandate of Congress could be defeated by a label—and a false one at that—despite the substance.

(D), 47 U.S.C. § 532(b)(1)(D). Yet Century Federal did not contend in the District Court that Appellants' commercial leased access requirements violated this portion of the Act. Moreover, the requirement of Appellants' franchise ordinance that Century Federal build a system with capacity for at least 80 channels (*see* Jur. Stmt. 8 n.6) is itself authorized by the Cable Act, although the District Court has now held the exercise of that authority to be unconstitutional as well. *See id.* at 16-17.

This case thus presents for review a holding that actions undertaken by Appellants pursuant to federal authorization and/or compulsion are unconstitutional. That fact distinguishes this case from those cited by Century Federal. In *United States v. Christian Echoes Ministry*, 404 U.S. 561 (1972), the District Court's decision did not "call into question the validity of the underlying statute." *Id.* at 564. Here, by contrast, the District Court's holding that franchise requirements for commercial and PEG access, universal service and specified facilities and equipment are unconstitutional necessarily "calls into question" the validity of a federal statute which specifically authorizes and/or mandates such requirements. *United States v. Raines*, 362 U.S. 17 (1960) holds only that this Court has jurisdiction over an appeal from a District Court decision holding a statute unconstitutional as applied to persons other that those involved in the case, even though the District Court erred "in considering the constitutionality of the [federal statute] in applications not before it." *Id.* at 23-24. And *Heckler v. Edwards*, 465 U.S. 870 (1984) simply states that an appellant which invokes Section 1252 must raise a constitutional issue—as opposed to collateral issues such as the scope of the remedy or attorney's fees.

Indeed, each of the three reasons identified by the *Heckler* Court as supporting Section 1252 jurisdiction is

applicable to this case. First, the District Court's decision finding unconstitutional Appellants' exercise of federally granted authority implicates separation of powers concerns, since the effect of the District Court's ruling is both to provide that cities may not exercise authority which Congress plainly intended them to have and to upset the careful balance struck by Congress between the rights and obligations of cable television operators and those of local franchising authorities. *See* Jur. Stmt. 19-22. Second, as the brief filed by *amici* City and County of Santa Cruz demonstrates, Section 1252 jurisdiction is advisable in this case because of "the need for certainty and uniformity in the administration of federal law." *Heckler, supra*, 465 U.S. at 883. Because the lower courts have not formulated clear and consistent rules governing such issues as the constitutionality of cable access (or even resolved the more fundamental question of what constitutional standard applies to First Amendment challenges brought by cable operators), this Court's guidance is urgently needed, and even Century Federal concedes that this case presents an appropriate record for resolving such issues. Finally, while impact alone is not a sufficient basis on which to predicate Section 1252 jurisdiction (*Heckler, supra*, 465 U.S. at 884), this case is one "whose impact [is] predicated upon a potentially incorrect exercise of judicial review." *Id.*

2. As an alternative basis for contending that this Court lacks jurisdiction over the appeal, Century Federal contends that the provisions in its cable franchise invalidated by the District Court were authorized by state law, rather than the Cable Act. Mot. Dis. 16-19. In this respect, too, Century Federal has failed to come to grips with the District Court's ruling. That court explicitly held that the provisions which its decision invali-

dated were "authorize[d]" by the Cable Act. JS App. 2a n.1. While Century Federal might have preferred the District Court to have based its ruling on a finding that the provisions in its franchise were authorized by state rather than federal law, as Century Federal itself recognizes, this Court's jurisdiction does not depend on "what the contentions of the parties might be as to what . . . [the] proper basis [of the District Court's order] should have been." Mot. Dis. 15 (quoting *United States v. Raines, supra,* 362 U.S. at 20).

The District Court's conclusion that Appellants exercised authority under the Cable Act in imposing access, universal service, and facilities and equipment requirements on Century Federal was unquestionably well-founded. Century Federal makes much of the fact that California law provides general authority for a California city to "prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system." Cal. Gov't Code § 53066. The franchise involved in this case, however, was enacted *after* the Cable Act was passed and adopted pursuant to its terms; thus, Appellants carefully conformed the terms of the franchise to the precise requirements and limits imposed by that Act. Thus the District Court's decision holds that the authority granted Appellants by Congress cannot constitutionally be exercised. Moreover, even if Century Federal were correct in asserting that Appellants' underlying authority to impose most of their franchise requirements derives from state rather than federal law, the District Court invalidated Appellants' commercial leased access requirement, which is required by the Cable Act, regardless of any state law to the contrary.

II.

THE UNITED STATES BECAME A PARTY TO THE PROCEEDINGS BELOW WHEN IT FILED A MEMORANDUM IN RESPONSE TO THE DISTRICT COURT'S CERTIFICATION.

The brief filed by the United States claims that it never became a party to the proceedings below because neither it nor the District Court complied with Rule 24 of the Federal Rules of Civil Procedure, which according to the United States prescribes the procedures to be followed under 28 U.S.C. § 2403(a). When the United States has a right to intervene under that statute, but intervention is *not* prompted by certification by the District Court, it is logical that the United States take the first step towards intervention by filing a Rule 24(c) motion. However, neither Rule 24(c), the Advisory Committee note to Rule 24, nor any case explicitly states that Rule 24(c) provides the exclusive procedure when the District Court *invites* intervention by 2403(a) certification. In such cases, there is no need for a formal motion, since the United States can intervene as of right and the parties will be on notice that intervention may occur since they will have received copies of the District Court's certification.[2] Indeed, the reported decisions demonstrate that the United States has often not availed itself of the procedures of Rule

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[2] In this case, moreover, both Appellants and Century Federal requested the District Court to issue a Section 2403(a) certification, thus putting them on notice that the United States might intervene. See Jur. Stmt. 9.

24 when it wishes to intervene in response to a certification under Section 2403(a).[3]

Even if Rule 24(c) does apply when a District Court invites intervention, that rule is inapplicable to this case. In this case, the District Court enunciated quite clearly the procedures which the United States was to follow if it wished to intervene; it stated that "[t]he United States may intervene in this action by filing a memorandum . . . addressing the question of the Act's constitutionality." JS App. 110a. Under these circumstances, no Rule 24(c) motion was necessary.

Thus, the issue before this Court is not whether the District Court followed Rule 24, but instead whether the United States intervened in response to the District Court's certification and in accordance with the procedure the District Court established. The United States and Century Federal rely heavily on a single sentence from the United States' memorandum which stated that "it is not appropriate to address the constitutionality of the Act in this litigation at this time." JS App. 116a. Both parties, however, ignore the fact that the memorandum filed

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[3] While the United States contends that it must follow Rule 24(c) in exercising its rights under Section 2403(a), the reported cases reveal that the federal government has followed a variety of procedural approaches in exercising its right to intervene following a District Court's certification under that statute. In some cases, for example, the United States has responded to a District Court's cerification by filing a "notice of intervention," as opposed to a motion. *Knox v. Milwaukee County Board of Election Commissioners*, 607 F. Supp. 1112, 1122 n.2 (E.D. Wisc. 1985). In other cases, the United States has responded to certifications pursuant to Section 2403 (a) by filing a brief as amicus curiae. *Blakeney v. Walton*, No. C-76-603-S (M.D.N.C. May 4, 1978) (Lexis, Genfed library, Dist. file). Finally, and most significantly for this case, the United States has also responded to Section 2403(a) certifications by filing memoranda, precisely as it did in the District Court below. *Ruenkamol v. Stifel*, 463 F.

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by the United States advanced a construction of the Cable Act which, if accepted by the District Court, would have removed any question of the Act's unconstitutionality. The United States asserted that the Cable Act does not provide authority to local franchising entities to impose the requirements challenged by Century Federal, but instead simply "delineates the scope of federal preemption of local regulatory authority . . . ." *Id.* at 120a. For this reason, while the brief filed by the United States did not take a position on the *First Amendment issues* raised by this case, it *did* address the Act's constitutionality, because it proffered a construction of that statute which would have eviscerated the constitutional challenge to its terms.[4]

The United States also argues that it would be unfair to impose the burdens of party status on it because its conduct in this case "was equally compatible with that of an amicus curiae" (Brief for the United States at 7), and that the federal government should not have to assume the burdens of party status if it wishes to inform a District Court that a constitutional issue certified to it

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Supp. 647, 648 (D.N.J. 1978) ("[W]e certified to the attorney general of the United States that the constitutionality of a federal statute had been challeneged, and the United States filed with this Court a memorandum of law in opposition to defendants' motion"); *see Sierra v. El Paso Independent School District*, 591 F. Supp. 802, 805 (W.D. Tex. 1984) (indicating that the attorney general filed a brief in response to notice given pursuant to Section 2403(a)). There was thus ample precedent for the procedural course taken by the United States below, and no reported decision holds to the contrary.

[4] Neither Century Federal nor the United States takes issue with the proposition that the Cable Act would not be open to serious challenge under the First Amendment if, instead of authorizing the requirements found by the District Court to be invalid, it simply provided that such requirements, if imposed by a local franchising authority, would not be preempted.

under Section 2403(a) is not properly before the court. *Id.* at 7-8 n.5. This argument fails on several counts. In the first place, the United States wrongly assumes that the burdens it undertakes when it intervenes under Section 2403(a) are comparable to those faced by other parties to litigation. In fact, however, Section 2403(a) limits the burden of the United States if it intervenes pursuant to that statute: it provides that the United States shall "have all the rights of a party and be subject to all the liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." Pursuant to this statute, the courts have held that the scope of intervention under Section 2403(a) is limited to presenting evidence and argument on the constitutional question. *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982); *Smolowe v. Delendo Corp.*, 36 F. Supp. 790, 792 (S.D.N.Y. 1940); *see Ruotolo v. Ruotolo*, 572 F.2d 336, 338-39 (1st Cir. 1978) (intervention under Section 2403(a) did not give United States right to pursue litigation after original parties to case resolved issue which prompted the government's intervention).

Nor is the government correct in asserting that finding jurisdiction over this appeal would prevent it from responding to a 2403(a) certification without becoming a party. In such a case, the correct procedural option for the federal government is clear; it may file a brief in the District Court as an amicus curiae, a route the Government has utilized in other cases in responding to Section 2403(a) certifications. *See* note 3, *supra*. But the government did not file as an amicus in the court below and, in fact, never claimed amicus status until the filing of its brief in this Court. Instead, the United States accepted

the District Court's invitation to intervene by filing a memorandum which offered a saving construction of the Cable Act designed to assure a finding of constitutionality. In doing so, it became a party to the action.

Thus the purpose of the direct appeal provision of Section 1252 has been fully satisfied in this case. An issue of the constitutionality of a federal statute was raised. The District Court recognized that and gave notice to the Attorney General as required by Section 2403(a). That notice gave the government the opportunity to say whatever it had to say in defense of the constitutionality of the statute, and the Attorney General did precisely that: it defended the statute by advancing an interpretation of it which, if accepted, would have saved the statute from unconstitutionality. The District Court, however, rejected that interpretation and held that the authority conferred by the statute cannot be constitutionally exercised. This Court therefore has jurisdiction over this important appeal.

CONCLUSION

This Court should note probable jurisdiction.

DATED: January 25, 1988.

Respectfully submitted,

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